

BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

[REDACTED] and [REDACTED]
on behalf of [REDACTED]

PETITIONERS

V.

HARDIN COUNTY SCHOOLS

RESPONDENT

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NO. 04-72

FINAL ORDER

D. Michael Dunavant
Administrative Law Judge
P.O. Box 150
Ripley, Tennessee 38063

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OFFICE OF LEGAL SERVICES

JUL 13 2005

**DIVISION OF
SPECIAL EDUCATION**

[To protect the confidentiality of the minor student, [REDACTED] will be referred to as "student" or "J.B." on all remaining pages of this decision, and the student's parents will be referred to as "parents" or "Mr. or Mrs. B."]

Introduction

A Due Process Hearing was requested by the parents on behalf of their 9 year-old son, JB. The request was received by the Tennessee Department of Education, Division of Special Education, on November 9, 2004, and the Department appointed and assigned this Administrative Law Judge to hear the case on the same date. The 45-day rule was waived by agreement of the parties during a telephone conference call on November 17, 2004, and an Order approving said waiver was entered and served upon the parties on the November 18, 2004.

The hearing was held in the Chancery Courtroom of the Hardin County Courthouse in Savannah, Tennessee, on Tuesday, March 1, 2005, and Wednesday, March 2, 2005. At the conclusion of the hearing, the Administrative Law Judge took the matter under advisement, and instructed the parties to submit post-hearing briefs, which were timely filed by both parties' counsel.

Procedural History

The parents, by and through counsel, initiated the Request for Due Process Hearing on November 4, 2004, alleging that the Hardin County School System failed to provide J.B. with a free and appropriate public education, and that the School System has committed numerous procedural violations of the Weldon Act, T.C.A. §49-10-101, et seq., the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq., and Section 504 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. §794 et seq. (See Request for Due Process Hearing and attendant correspondence) The parents alleged the following violations in their Request for Due Process Hearing, and during the course of the hearing:

- A. J.B. has had the same teacher since Kindergarten, and has had the same IEP goals.
- B. J.B. has not made any educational progress since he has been a student at Paris South Elementary School, nor has he received any educational benefits.
- C. J.B. has not received any occupational therapy (OT) or physical therapy (PT) for the past year, and the same was not offered in his current 2004-2005 IEP, despite the fact that he is unable to write or walk appropriately.
- D. The School System failed to provide the parents with a copy of the August 17, 2004 IEP Team minutes, nor were the parents given a copy of the Conference Notes to which they could sign their disagreement.
- E. The parents also alleged that Mrs. B. did not receive a copy of or approve the May, 2004 IEP, and that this constituted a procedural violation.

The parents, in their Request for Due Process Hearing, suggested and requested the following remedies and relief from the School System for the alleged violations:

1. Reimburse the parents for the expenses related to J.B.'s education for the 2004-2005 school year, including but not limited to the cost of a certified teacher and staff to provide education for him at home until such time as the School System can provide an IEP which is designed to provide J.B. with an educational benefit.
2. Contract with Vanderbilt TRIAD to help develop an appropriate IEP and behavior plan.
3. Provide speech therapy, occupational therapy, and physical therapy through the Kiwanis Center.

4. Provide appropriate training for any staff who plans to work with J.B. in the future.
5. Provide an assistive technology assessment from the STAR Center.
6. Provide three (3) years of compensatory education for the denial of FAPE.
7. Payment of attorney's fees and costs related to this action.

Pre-trial Motions

Counsel for the School System made three pre-trial motions which were ruled upon prior to taking any proof in this matter. Counsel first moved to limit or exclude the testimony of Dr. Arie L. Nettles, Ph.D., with regard to speech therapy, OT, PT, and appropriateness of educational services. This motion was conditionally denied, as the testimony of Dr. Nettles was presented by deposition, and the objections of the School System went to the weight and not the admissibility of the evidence. Counsel for the School System next moved to limit or exclude the testimony of Regina Haynes, with regard to speech therapy, OT, PT, and appropriateness of educational services. This motion was also conditionally denied, as counsel for the parents indicated that Ms. Haynes was not being offered as an expert witness in any of the areas objected to, and again, the Administrative Law Judge felt that the objections of the School System went to the weight and not the admissibility of the evidence. Counsel for the School System finally moved to limit or exclude the testimony of Kim Pittard, with regard to speech therapy, OT, PT, and appropriateness of educational services. Again, this motion was conditionally denied, as the objections of the School System went to the weight and not the admissibility of the evidence.

Witnesses

At the hearing, the parents presented testimony of seven (7) witnesses. They were as follows:

1. Mrs. B. – mother of J.B.
2. Mr. B. – father of J.B.
3. Regina Haynes – behavior analyst hired by the parents to work with J.B.
4. Candy Smith – Speech and Language pathologist with the Hardin County School System
5. Kristy Hardin – maternal aunt of J.B. and regular education 7th grade science and English teacher at Hardin County Middle School
6. Kim Pittard – private tutor hired by the parents to work with J.B.
7. Dr. Arie L. Nettles, Ph.D – testified by deposition; Associate Professor of Pediatrics and Licensed Psychologist at Vanderbilt Children's Hospital Center for Child Development, who performed a psychological evaluation of J.B. at the request of the Hardin County School System

The School System presented the testimony of six (6) witnesses, as follows:

1. Paul Thomas Blair – certified and licensed occupational therapist with LeBonheur Children's Medical Center Therapy Outreach in Jackson, Tennessee, who contracts with school systems to provide services. Evaluated and treated J.B. in August, 2003.
2. Jana Carroll – psychological examiner with the Hardin County Board of Education

3. Christie Patton – testified by deposition: speech pathologist who contracts with Hardin County Board of Education, and who has worked with J.B. since he was three years old
4. Renea Johnson – special education teacher in a self-contained (CDC) classroom at Paris South Elementary School; J.B.’s special education teacher
5. Kay Flowers – preschool/educational consultant for the State of Tennessee, Division of Special Education
6. Kathy Blurton – Special Education Supervisor for the Hardin County School System

The extent of each witness’ training, experience, and expertise, as well as the direct contact and experience each had with J.B. were primary elements considered by the Administrative Law Judge in determining the weight given to each individual’s testimony and to the recommendations that each made.

Findings of Fact

J.B. is now a ten (10) year old autistic child in the Hardin County School District, which is the only public school system that he has ever attended. J.B. has been diagnosed with severe developmental delay, autism, and microcephaly. His birth was complicated by umbilical cord neck compression necessitating resuscitation, ventilation, and a weeklong hospital stay. He is further compromised by virtue of slow speech progression, flat feet, stereotypic movements, and growth failure. (Psychological evaluation of Dr. Nettles, parents’ exhibit #1, p. 18, and hearing testimony of Mrs. B.) . J.B. was initially certified as developmentally delayed by Cathy Browder on March 5, 1998, when he was 3.3 years old. (Parents’ exhibit #1, p.1). In re-testing on May 6, 1998, J.B. tested as 24

months in the Social area, 24 months in Gross Motor skills, 30 months in Fine motor skills, 18 months in Language, and 22 months in Cognitive area. (Parents' exhibit #1, p.6). The parents arranged and privately paid for a comprehensive psychological evaluation on June 22, 2000, by Dr. William Allen, Ph.D., with Cherokee Health Systems. (Parents' exhibit #1, p. 9). Dr. Allen diagnosed J.B. with autism and developmental delay, and recommended intensive intervention with speech and language therapy and occupational therapy on a weekly basis. (Parents' exhibit #1, p.11-12). Mr. B. refused to provide the School System with a copy of Dr. Allen's report for almost one year from date it was prepared. (Hearing transcript, p.140, 247-249). Mr. B. refused the School System's request for an evaluation of J.B. in 2001, and he did not provide the School System with Dr. Allen's report until the summer of 2001. (Hearing transcript, p. 247-249). Thereafter, Mr. B. agreed to provide a copy of Dr. Allen's report to the School System, and Dr. Allen's report was considered and addressed in a meeting in August, 2001, after the School System confirmed with Dr. Allen that the report was still viable. (Hearing transcript, p.726-727; Parents' exhibit #1, p.8). J.B. received educational services through the Hardin County School System until the unilateral withdrawal of him from the system in August, 2004. If the student had not been withdrawn from the public school, he would have been scheduled for another evaluation in the fall of 2004, as the law requires a re-certification every three years. (Hearing transcript, p. 727).

J.B. is currently functioning at a very low level, according to the most recent evaluation performed by Dr. Arie L. Nettles at Vanderbilt Children's Hospital on January 20, 2005, at the request of the School System after the parents' filing of the Request for Due Process Hearing. (See Psychological Evaluation Report of Dr. Nettles, parents'

exhibit #1, p. 18; Deposition testimony of Dr. Nettles). Dr. Nettles tested J.B. with the WIPPSI-III for ages 2 years 6 months to 3 years 11 months, and found that the student's performance fell within the extremely low average range compared to children between the ages of 2.5 and 4 years. (See Psychological Evaluation Report of Dr. Nettles, parents' exhibit #1, p. 18; Deposition testimony of Dr. Nettles). Dr. Nettles determined that J.B. at ten years old as compared to a normal 2.5 year old to 4 year old was in the 3rd percentile range for overall functional ability. (Deposition testimony of Dr. Nettles, p. 40, 48). According to Dr. Nettles, any measurable progress with J.B. would be in very small steps and increments, and any personnel who work with the student should be cautioned that it will be a very painstaking process to even see small steps. (Deposition testimony of Dr. Nettles, p. 56).

Mrs. B. testified at the hearing, and the Administrative Law Judge finds her testimony as the mother of J.B. to be credible and compelling. J.B. is a loving, persistent, hard-working child who, from the very beginning exhibited low muscle tone. Up until about age 2, J.B. made regular eye contact, and played as normal children do, although he did not reach the same milestones as expected of normal children his age. Around age 2, J.B. began to "fade away", as described by his mother, by losing eye contact and the ability to communicate. (Hearing transcript, p. 34-36). Despite taking J.B. to numerous doctors, neurologists, and specialists, and testing for different syndromes, the parents were never sure of his diagnosed condition, and had not heard the word autism. (Hearing transcript, p. 37-38). Dr. Allen identified J.B. as autistic, and further explained to Mrs. B. about sensory processing, or "stemming", which is described as humming, flapping and

clapping of the hands, or shaking of the head, which is a sign of autism marked and caused by over-stimulation. (Hearing transcript, p.46-47).

By all accounts, there has always been a good working relationship between the Hardin County School System and the parents. They had a great relationship that including sharing of ideas and a commitment to communication about J.B. Mrs. B. admitted that she and the School System really worked as a team to think outside the box and go the extra mile with J.B. (Hearing transcript, p.147-148, 151). Mrs. B. communicated with the school on a daily basis regarding her child and his progress. Mrs. B. has never had a problem with Mrs. Blurton, believes that she has been great, and that she has always provided support and materials for her staff. (Hearing transcript, p. 100). Hardin County School System personnel attended numerous continuing education courses and routinely invited Mrs. B. to attend those sessions, including a meeting in the Fall of 2003 with Dr. Wendy Ashcroft, an expert in autism. (Hearing transcript, p 149-153). The School System sent written reports home every six weeks on J.B.'s progress towards his IEP goals, which the parents signed and returned to school. (Hearing transcript, p. 266-267). Mrs. B. believes that the best methodology to utilize with J.B. is an ABA approach, and last year, the school and Mrs. B. developed an IEP that incorporated ABA methodology. (Hearing transcript, p. 147). Mrs. B. was thrilled and excited with the plan that the school proposed for J.B., and her only concern was whether or not the school actually followed through with and implemented the plan. (Hearing transcript, p. 154. 160). Mrs. B. acknowledged that she would be happy with the program described by the witnesses at the hearing so long as the school personnel were actually working with the child consistent with their testimony. (Hearing transcript, p.

775-776). However, the only indication that Mrs. B. had that the school was not implementing the plan or that J.B. was not receiving the services was her belief that J.B. did not make as much progress as she expected, that she did not see results, and that she did not see any proof or documentation of what he worked on at school. (Hearing transcript, p.223, 776). However, Mrs. B. did acknowledge, when confronted with J.B.'s portfolio of daily activities, which she participated in developing and approving, that J.B. did show progress in the areas of knowledge of colors, numbers, ABC's, his ability to make elementary choices, advances in verbalization, expansion of his vocabulary, and PECS schedule and activities, while he was in Ms. Johnson's CDC classroom (Hearing transcript, p. 190-196, 775; see also hearing collective exhibit #7). In any event, Mrs. B. wants J.B. to return to the Hardin County public schools, but wants a TRIAD evaluation and implementation, to send people into the classroom to check on J.B., to keep the school accountable, so she will not have to worry about it. (Hearing transcript, p. 221-222).

Mr. B. testified at the hearing as well. Mr. B. testified that he started to see regression in J.B. about a year and a half to two years ago, and that J.B. started "fading away". (Hearing transcript, p. 226-227). In May, 2004, Mrs. B. had concerns that there were no therapists at the school to work with J.B., and she was considering not sending J.B. back to school the next year. (Hearing transcript, p. 229-230). However, Mrs. B. did not check on the form that she disagreed with the proposed IEP, because she did not want to hurt anyone's feelings at the school. (Hearing transcript, p. 230). Ms. Regina Haynes, a behavioral specialist, met Mr. and Mrs. B. at a restaurant when she approached them. (Hearing transcript, p. 231). Ms. Haynes told Mr. B. that she could have J.B. reading at a

second grade level within a year. (Hearing transcript, p. 250). Mr. B. was skeptical of Ms. Haynes at first, but after she worked with J.B. for a month, Mr. B. started seeing progress. (Hearing transcript, p.231). Mr. B. testified that it is his intention and desire that his son come back to the Hardin County Schools, if certain things are corrected, and if Dr. Nettles' recommendations of TRIAD be implemented with J.B. until he is out of school. (Hearing transcript, p. 240-241). Mr. B. wants to have people working with J.B. who are "educated to the max", and he wants Dr. Nettles, TRIAD, and Vanderbilt to work with his son because they are the "elite" in Tennessee on autistic children. (Hearing transcript, p. 241). At the August IEP team meeting, Mr. B. told the school that he did not care whether J.B. was ever potty trained, as long as he knows how to read and communicate. (Hearing transcript, p. 250). Mr. B. testified that although Ms. Haynes is not as qualified as Ms. Renea Johnson, he looks at results as being important. (Hearing transcript, p. 253). Mr. B. is not aware of what the school was doing with J.B., or what he was capable of doing at school, because he only knows what he saw at home. (Hearing transcript, p. 257).

Ms. Regina Haynes, who has a Master's degree in special education and training and experience as a behavior analyst, testified on behalf of the Petitioners at the hearing. Most of her professional experience, however, has been with adults with severe disabilities. (Hearing transcript, p. 270). Ms. Haynes was not offered as an expert witness in any area, but merely as a fact witness regarding her interaction and work with J.B. (Hearing transcript, p. 273). Ms. Haynes met Mr. B. and Mrs. B. in July, 2004, in a restaurant when she approached them. (Hearing transcript, p. 282). Ms. Haynes spent less than one-half (1/2) of a day with J.B. before she told Mr. B. and Mrs. B. that she

could have J.B. reading a second grade level within one year. (Hearing transcript, p. 283-284). Ms. Haynes told the parents that she was qualified to develop an IEP for J.B., but later admitted under cross-examination that she was not so qualified. (Hearing transcript, p. 284). Ms. Haynes told the parents that she felt she could teach J.B. to read within one year by using a book entitled "One hundred easy lessons to reading", which could be purchased at Davis-Kidd bookstores. (Hearing transcript, p. 284). Ms. Haynes testified that she believes that she is just as qualified someone who has been teaching special education for twenty-eight years (Hearing transcript, p. 286). Ms. Haynes recommended and suggested that the parents hire a private teacher, Ms. Kim Pittard, to teach J.B. in the home, despite the fact that Ms. Pittard is not a certified teacher, and has no educational experience teaching autistic children before. (Hearing transcript, p. 286-287). Ms. Haynes testified that the ABA discrete trial method is one of the best methods to use with an autistic child, and she endeavored to train Ms. Pittard in this method for 30 minutes to one hour, after which she was as confident of Ms. Pittard's ability to teach using this method as she would be with a teacher that had 28 years of experience in this method. (Hearing transcript, p. 287-288). Ms. Haynes also told the parents that she could potty train J.B. in two weeks, whenever they decided to do it. However, since August, 2004, Mr. B. and Mrs. B have not decided to accomplish this goal. (Hearing transcript, p. 291-292). In Ms. Haynes' opinion, the least restrictive environment for J.B. would be for him to be mainstreamed in a regular education classroom. Ms. Haynes further indicated that the most restrictive environment for J.B. is his current private educational placement in an empty Sunday school room, because he needs social interactions with other age-appropriate peers. (Hearing transcript, p. 297-298). The Administrative Law Judge does

not find Ms. Haynes' testimony to be credible, for multiple reasons. Although seemingly well intentioned, Ms. Haynes does not appear to have the necessary qualifications or experience with autistic children to competently provide an effective and reliable educational benefit to J.B. Further, this ALJ found her testimony to be unreasonable and unrealistic in light of all of the facts and circumstances surrounding the education and history of this child, and her responses to cross-examination questions were evasive, contradictory, and equivocal.

Ms. Candy Smith, a speech-language pathologist with the Hardin County School System, testified at the hearing. Although Ms. Smith is admittedly friends with J.B.'s parents and attends the same church as this family, inasmuch as her testimony was given possibly against her personal interest as an employee of the school district, the Administrative Law Judge finds her to be a credible witness. Although Ms. Smith never observed the CDC classroom in which J.B. was placed, she has observed the CDC classroom this year. (Hearing transcript, p. 307-308). In her opinion, there could have been more structured activities in working with the children in the areas of language and communication skills, and she felt that there was room for improvement and agreed that the TRIAD evaluation and monitoring of the classroom would be appropriate. (Hearing transcript, p. 309-310). Ms. Smith admitted that she had not spent a full day in a CDC classroom, and that she was just in the classroom during and after lunch and other break periods. (Hearing transcript, p. 311-312).

Ms. Kristy Hardin, J.B.'s maternal aunt and a 7th grade regular education teacher in the Hardin County Schools, testified at the hearing. Ms. Hardin testified that she has seen J.B. for at least one hour per week since he has been schooled in his home. She

indicated that she has seen positive changes and progress in J.B.'s verbal skills, eye contact, and responsiveness. (Hearing transcript, p. 324-327). Since Ms. Hardin is not a special education teacher, had not observed J.B. in his educational setting at Hardin County schools, and is related to the Petitioners, the Administrative Law Judge found her testimony to be generally credible, but did not place much significance or weight on the same.

Ms. Kimberly Pittard testified at the hearing. Ms. Pittard was hired by the parents to work with J.B. as a full-time tutor since January, 2005, from 9:00 a.m. to 3:00 p.m., five days per week. (Hearing transcript, p. 330). Ms. Pittard graduated high school, and has two years of college psychology classes. She has worked previously for facilities for adult disabled people as a house manager, has never worked with disabled or autistic children prior to J.B., and has worked with Ms. Haynes in the past. (Hearing transcript, p. 330-331). Mrs. B. provided Ms. Pittard with the lesson plans for J.B., and in the time she has worked with J.B., she believes that he has made progress. (Hearing transcript, p. 332). Ms. Pittard teaches J.B. in an empty church classroom, but allows J.B. to have interaction with other children during lunch, music class, and P.E. class. (Hearing transcript, p.333). Ms. Pittard testified that she uses prompts in instructing J.B., including repetitive, hand-over-hand techniques. She then decreases and finally eliminates the prompts as J.B. learns and masters the skill. (Hearing transcript, p. 334). Ms. Pittard believes that J.B. has mastered some skills, has improved in his social interaction skills, and has decreased his stemming behaviors. (Hearing transcript, p. 335-338). Based upon her one hour of training and instruction from Ms. Haynes in the ABA discrete trial methodology, Ms. Pittard feels that she is just as qualified to teach a child with autism

like J.B. as a CDC teacher with 28 years of experience and yearly training. (Hearing transcript, p. 344-345). In order for J.B. to make eye contact, Ms. Pittard testified that she has to get 2-3 inches from his face, and prompt him by holding or touching his chin, while being loud and animated to keep his attention. (Hearing transcript, p. 348). Ms. Pittard is not licensed in the State of Tennessee as a teacher, she is not properly certified or qualified as a paraprofessional under state law, and she has no formal special education training. (Hearing transcript, p. 351). Although Ms. Pittard believes that J.B. has shown adequate progress in her instruction of him, the record indicates the contrary. The description of the educational environment created by Ms. Pittard shows that such environment is not the least restrictive environment for J.B., and may even be contributing to his regression and loss of potential educational benefit. The Administrative Law Judge finds Ms. Pittard to be significantly unqualified to teach an autistic child such as J.B., and her behavior may even be illegal pursuant to applicable state law governing qualifications and requirements for tutors in the home school setting. As such, her testimony regarding the facts of this case are not credible, and the ALJ does not place any weight on her statements.

Dr. Arie L. Nettles, Ph.D., testified by deposition at the hearing, and the Administrative Law Judge read and considered the deposition testimony of Dr. Nettles for evidentiary purposes in this hearing. Dr. Nettles is an Associate Professor of Pediatrics and Licensed Psychologist at Vanderbilt Children's Hospital Center for Child Development, who performed a psychological evaluation of J.B. at the request and expense of the Hardin County School System. Dr. Nettles testified that she is not qualified to offer any opinions regarding occupational therapy, physical therapy, or

speech therapy services in an educational context, and that she would defer to the certified service providers in those areas who have worked with J.B. with respect to which services would be most appropriate for him in a school context. (Deposition testimony of Dr. Nettles, p. 33, 124-125). Dr. Nettles made it clear in her testimony that the recommendations in her report were intended as suggestions, and that she was not making any comment on the services provided by Hardin County. (Deposition testimony of Dr. Nettles, p. 95-96). Dr. Nettles further clarified that nothing in her report was intended to address the provision of services in an educational context, and she did not intend any statement in her report to be a criticism or comment upon any of the services provided by Hardin County. (Deposition testimony of Dr. Nettles, p. 34-35, 124-125, 158-159). Finally, Dr. Nettles made it clear that she was not suggesting in her report that TRIAD was a better option than the educational plan provided by Hardin County to J.B. (Deposition testimony of Dr. Nettles, p. 159-160). Although the Administrative Law Judge finds Dr. Nettles to be eminently qualified as a child psychologist, it seems clear that her testimony is limited to issues that do not speak to the sufficiency of different methodologies, services, or techniques in the educational context. and so her testimony was taken as credible in light of those limitations to speak to the ultimate issues in this case.

Motion for Directed Verdict

At the close of the Petitioners' proof, the Respondent made a Motion for Directed Verdict in favor of the school district both as to procedural and substantive violations of the IDEA in the alleged denial of a free, appropriate, public education. Only if a procedural violation has resulted in a substantive harm, and thus constitutes a denial of a

FAPE, may relief be granted. Knable ex rel. Knable v. Bexley City Sch. Dist., 238 F.3d 755, 762 (6th Cir. 2001) (citing 20 U.S.C. §1414(a)(5)). A procedural violation can cause substantive harm when it seriously infringes upon the parents' opportunity to participate in the IEP process. Knable ex rel. Knable v. Bexley City Sch. Dist., 238 F.3d 755, 762 (6th Cir. 2001) (citing 20 U.S.C. §1414(a)(5)); see also Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). If the procedural requirements of the IDEA are met, greater deference is to be afforded to the district's placement decision. Dong ex rel. Dong v. Bd. of Educ. of the Rochester Cmty. Sch., 197 F.3d 793, 799 (6th Cir. 1999). The Administrative Law Judge does not find that any procedural violation of the IDEA by the school district in this case acted to deny J.B. of any educational benefit. Although Mrs. B. reported in her testimony that she did not receive a copy of the last IEP from 2004-2005 school year, she further testified that she signed said IEP, participated in the IEP meeting at which the same was developed and drafted, knew the contents of the proposed IEP, and that she received and understood her rights at the meeting. However, Mrs. B. did not indicate to the school district whether she was in agreement with the IEP, because she did not want to be confrontational. Therefore, the Respondent's Motion for Directed Verdict as to alleged procedural violations of the IDEA is granted, and the Petitioner's claims related thereto are de minimis, harmless, and without merit, and dismissed.

The Respondent's Motion for Directed Verdict as to alleged substantive violations of the IDEA was denied. Thereafter, the Petitioners stipulated that they had no objection to or claims regarding any alleged violation of the IDEA, except with the education of J.B. for the past two (2) years.

Further Findings of Fact upon Respondent's proof

Paul Thomas Blair, a certified and licensed occupational therapist with LeBonheur Children's Medical Center Therapy Outreach in Jackson, Tennessee, testified at the hearing. He contracts with school systems to provide services, and he evaluated and treated J.B. in August, 2003. J.B. has always had a problem with gait, balance, gross and fine motor skills. The Kiwanis Center discontinued occupational therapy services for J.B. in 1997. However, when J.B. came into the Hardin County schools, they resumed these OT services. Thereafter, the OT services were discontinued by the certified occupational therapist after a determination that J.B. had reached a plateau, and that additional services would provide no further benefit to him, according to certain factors contained in a policy and procedure for making recommendations of discontinuation of services. (Hearing transcript, p. 432-435; see also trial exhibit 11). Mr. Blair recommended upon re-assessment of J.B. that OT services be discontinued, due to a showing of no discernable progress in the required areas, indicating that he had reached a plateau. (Hearing transcript, p. 436, 441). Mr. Blair indicated that this recommendation for discontinuation of services based upon plateau of the child was appropriate under the applicable Tennessee state guidelines for special education. (Hearing transcript, p.441). According to Mr. Blair, if Hardin County has disagreed with his prior opinions about discontinuation of services, or if they have erred in IEP meetings, it does so by providing and continuing more OT services than are required by the law. (Hearing transcript, p. 442). If J.B. returns to the Hardin County schools, Mr. Blair would recommend a new OT evaluation for him to determine whether and to what extent OT services should be implemented. (Hearing transcript, p. 443). Mr. Blair indicated that his OT services

would not provide J.B. with any further benefit over and beyond than which is regularly provided to him in the CDC classroom, which includes a wide range of different devices, toys, and sensory integration methods and tools to work on developing J.B.'s fine motor skills. (Hearing transcript, p. 474). The Administrative Law Judge found Mr. Blair to be highly qualified in the area of occupational therapy, and found his testimony to be credible and helpful in determining issues of related services.

Jana Carroll, a psychological examiner with the Hardin County Board of Education, testified at the hearing. Although she has never met, tested or evaluated J.B., she has evaluated children as low functioning as J.B., and has reviewed Dr. Nettles' report and J.B.'s educational file generally. (Hearing transcript, p. 481-482). She was offered by the Respondent as a rebuttal witness to Dr. Nettles' testing results and report. Ms. Carroll's testimony was highly complex and technical regarding standard testing, raw scores, percentile rankings, age equivalent ranking, mean scores, margins of error, etc., and generally beyond the understanding of laypersons. However, the Administrative Law Judge generally found her to be qualified in her area of expertise, and credible with regard to her findings and opinions related to J.B.'s test scores and their proper interpretation. According to Ms. Carroll, J.B.'s raw and standard test scores did not show regression, but merely stayed static, which was indicated and consistent with Dr. Nettles' report, and which is not unusual for children with severe autism. (Hearing transcript, p. 493, 496, 515-516).

Christie Patton testified by deposition (see trial exhibit 15). She is a speech pathologist who contracts with Hardin County Board of Education, and who has worked with J.B. since he was three years old, and has been his principal provider of speech

therapy for the last 6 years. (Deposition testimony of Christie Patton, p. 10). Ms. Patton has observed that J.B. has speech and language delays and that his receptive language is better than his expressive. Over the last 2 to 4 years, J.B. has made considerable expressive progress in many different areas. An ongoing goal has been to increase his spontaneous speech. (Deposition testimony of Christie Patton, p. 11-12). J.B.'s ability to learn the names for objects in pictures has taken a considerable amount of time to develop. (Deposition testimony of Christie Patton, p. 14). When Ms. Patton worked with J.B., he knew his letters and had an extensive vocabulary. Every year that she worked with J.B. he made progress. (Deposition testimony of Christie Patton, p. 15-16). The IEP teams did whatever they could to incorporate the parents' approach at home into the school setting. They used ABA methodology and they used the same cards and pictures that were used at home, so that J.B. could generalize skills from home to school. (Deposition testimony of Christie Patton, p. 20). Ms. Patton testified that J.B. was making considerable progress in the areas of expanded verbal language skills, increased vocabulary, and decreased cues. She further testified that the goals for J.B. in the 2004-2005 IEP were appropriate for him from a speech therapy perspective, and recommended to ensure that he received an educational benefit. (Deposition testimony of Christie Patton, p. 21-26). The Administrative Law Judge found Ms. Patton's deposition testimony to be credible, in light of her actual direct contact and experience with J.B.

Renea Johnson, a special education teacher in a self-contained (CDC) classroom at Paris South Elementary School, and J.B.'s special education teacher, testified at the hearing. Ms. Johnson has been teaching special education for the last 24 years, and is certified in special education, elementary education, and K-12. (Hearing transcript, p.

529-530). Ms. Johnson has received exhaustive training in special education, including receiving all of the training available from the TRIAD program at Vanderbilt, attending numerous training courses by the Tennessee Autism Association, and attending seminars conducted by the Shelby County Schools. (Hearing transcript, p. 531-534). Ms. Johnson has received a tremendous amount of training from TRIAD and has been advised by the program that she has received everything that they have to offer. Further, TRIAD has advised Ms. Johnson that she has received more training in its methodology than anyone else in West Tennessee. (Hearing transcript, p. 532). Ms. Johnson testified that she has received over 150 hours in training for the ABA discrete trial method, and that it would be impossible for someone to be taught the methodology in 30-45 minutes. (Hearing transcript, p. 538). Ms. Johnson has three certified paraprofessionals who assist in her classroom, and her student-educator ratio is very low, with a total of 8 students in her class this past year. (Hearing transcript, p. 530). Ms. Johnson brought all of the materials back from her training sessions, and trained her paraprofessionals in the proper techniques and methodology. (Hearing transcript, p. 539). Ms. Johnson produced at the hearing as demonstrative evidence a myriad of numerous objects, devices, pictures, toys, and other tools that she uses with J.B. and other children in her classroom, according to the ABA methodology (see trial exhibit 19). She used the PECS program with J.B. each year, and he demonstrated progress with this program. This PECS program is highly recommended for use with children such as J.B., and is exactly what Mrs. B. wanted to be used with him. (Hearing transcript, p. 552-554). There was someone with J.B. either Ms. Johnson or a classroom assistant, every minute of every day. (Hearing transcript, p. 558, 564). Ms. Johnson testified that she attempted to integrate J.B. and include him with

his peers and other students to the maximum extent possible, in accordance with the IDEA. (Hearing transcript, p. 558-559). During the time that J.B. worked with the various programs and methodologies in her classroom, Ms. Johnson observed that J.B. demonstrated educational progress in many different areas, including daily living skills. (Hearing transcript, p. 581). Ms. Johnson testified regarding videotape demonstrative evidence which the ALJ has reviewed, and which she indicated was an accurate depiction of the classroom environment of the CDC class where J.B. was placed. (Hearing transcript, p. 588-589; see trial exhibit 21). Ms. Johnson always tried to cooperate with Mr. B. and Mrs. B., and anytime that they brought her new information about a new or different method or program, Ms. Johnson always tried to incorporate them into J.B.'s program. (Hearing transcript, p. 600-601). Mrs. B. was always welcome to come into Ms. Johnson's CDC classroom to observe and participate in J.B.'s educational instruction and process. (Hearing transcript, p. 602). Kay Flowers, from the State of Tennessee, came to her classroom to monitor and observe her instructional techniques, and found them to be appropriate, as did Kathy Blurton, the Hardin County special education director. (Hearing transcript, p. 603). Ms. Johnson explained that although progress for J.B. should be measured and viewed in tiny increments, and not in drastic, unrealistic ways, J.B. was still making measurable progress, and his goals in the IEP were appropriate. (Hearing transcript, p. 616-617). Ms. Johnson did not believe that J.B. regressed at any time he was in her class, and she was very pleased with his progress. (Hearing transcript, p. 631). Ms. Johnson indicated that while she did not have any objection or opposition to TRIAD coming into the school to monitor her class, she feels that it would be unnecessary in light of the extensive training that she has received from

TRIAD in the appropriate methodology. (Hearing transcript, p. 636-637). The Administrative Law Judge found Ms. Johnson to be extremely qualified and dedicated as a special education teacher who has been extensively trained in autism methodologies. She was an extremely credible witness, and the ALJ placed significant weight on her testimony, due to her education, training, experience with J.B., and her overall demeanor.

Kay Flowers, a preschool/educational consultant for the State of Tennessee, Division of Special Education, was presented as a witness for the Respondent at the hearing. Ms. Flowers supervises and oversees compliance with the IDEA and special education guidelines by working with and monitoring special education classes across West Tennessee with regard to proper curriculum and instruction methodologies, and further provides technical assistance to schools. (Hearing transcript, p. 674-675). In 2001, Hardin County schools requested that Ms. Flowers come to Hardin County to evaluate J.B.'s educational program, and upon her review of the same, she determined that it was appropriate. (Hearing transcript, p. 657-676). Ms. Flowers could not believe the level and extent of training that Ms. Johnson has received, and characterized it as "amazing". Ms. Flowers is of the opinion that Ms. Johnson is qualified to implement and follow up with the TRIAD method. (Hearing transcript, p. 681-682). Ms. Flowers would rank Ms. Johnson among the top of CDC teachers across West Tennessee, in terms of the amount of autism training that she has received and her overall qualifications. (Hearing transcript, p. 683). In the opinion of Ms. Flowers, Hardin County has at all times provided J.B. with a free and appropriate public education, and described the level of educational services as a "Mercedes". (Hearing transcript, p. 684). Ms. Flowers further described the approach, materials, and technologies used by Hardin County as "cutting

edge". (Hearing transcript, p. 695). The Administrative Law Judge found Ms. Flowers to be a highly credible witness.

Kathy Blurton, the Special Education Supervisor for the Hardin County School System, was the final witness of the Respondent presented at the hearing. The Superintendent of the Hardin County Schools has given 100% support to the special education division, always making funds available for whatever is needed in terms of equipment and training. Ms. Blurton has always ensured that Ms. Johnson has received any and all materials, devices, and other support that she has requested. (Hearing transcript, p. 699-700). Ms. Blurton has attended every IEP team meeting ever held for J.B. (Hearing transcript, p. 706). Ms. Blurton feels that she has always had a good relationship with Mr. B. and Mrs. B., and she has always been able to communicate with them. (Hearing transcript, p. 708). Ms. Blurton felt that J.B.'s IEP was appropriate to provide him with an educational benefit in the least restrictive environment, and tried to accommodate the parents' requests and concerns. Ms. Blurton has made numerous efforts over the years to explain to Mrs. B. that J.B. was receiving support from an assistant or teacher whenever he was working on educational objectives. However, Ms. Blurton believes that the problem has been one of perception with Mrs. B., who believes that J.B. only receive one-on-one attention when working with Ms. Johnson or a speech therapist. (Hearing transcript, p. 713-715). In December, 2004, Ms. Blurton observed J.B. in his private educational placement at the church classroom. She observed that J.B. is in the most restrictive educational environment, rather than the least restrictive. J.B. is not receiving enough educational support, he is isolated in a building by himself, and is not integrated with other students like he was in school. (Hearing transcript, p. 742, 749).

Ms. Blurton also observed that J.B. had regressed in a number of areas, including becoming more prompt dependent, and that he had increased his stemming behavior. (Hearing transcript, p. 744-745). The Administrative Law Judge found Ms. Blurton's testimony to be very credible, and relied heavily upon this proof in reaching an ultimate decision in this matter.

Conclusions of Law

The purpose of the IDEA is to give children with disabilities a free appropriate public education designed to meet their unique needs. Burilovich ex rel. Burilovich v. Bd. of Educ. of the Lincoln Consol. Sch., 208 F.3d 560 (6th Cir. 2000) (citing U.S.C. §1401(25), 1412). As part of providing a FAPE, school districts receiving funds under the IDEA are required to establish an IEP for each child with a disability. Knable ex rel. Knable v. Bexley City Sch. Dist., 238 F.3d 755, 762 (6th Cir. 2001) (citing 20 U.S.C. §1414(a)(5)). The IEP must "contain a specific statement of the child's current performance levels, the child's short-term and long-term goals, the educational and other services to be provided, and criteria for evaluating the child's progress." Id. at 763 (citing 20 U.S.C. § 1401(1)(20)).

There are two parts to a court's inquiry in suits brought pursuant to the IDEA. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982); McLaughlin v. Holt Pub. Sch. Bd. of Educ., 320 F.3d 663, 669 (6th Cir. 2003). Second, the court must assess whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefits. Rowley, 458 U.S. at 207; accord Kings

Local Sch. Dist., Bd. of Educ. v. Zelazny, 325 F.3d 724, 729 (6th Cir. 2003). Parties challenging an IEP have the burden of proving by a preponderance of the evidence that the IEP devised by the school district is inappropriate. Zelanzny, 325 F.3d at 729; Dong ex rel. Dong v. Bd. of Educ. of the Rochester Cmty. Sch., 197 F.3d 793, 799 (6th Cir. 1999).

In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. . . . We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child. Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). The Supreme Court explicitly rejected the argument that school districts are required to provide services "sufficient to maximize each child's potential commensurate with the opportunity provided other children." Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

A school district is only required to provide educational programming that is reasonably calculated to enable the child to derive more than *de minimis* educational benefit. Doe ex rel. Doe v. Smith, 879 F.2d 1340, 1341 (6th Cir. 1989). Courts have decided that school systems are not required to provide autistic children with the sort of intensive (and expensive) educational program pioneered by Dr. Lovaas. Burilovich ex rel. Burilovich v. Bd. of Educ. of the Lincoln Consol. Sch., 208 F.3d 560 (6th Cir. 2000).

At some point, however, this facile answer becomes insufficient. Indeed, there is a point at which the difference in outcomes between two methods can be so great that provision of the lesser program could amount to denial of a FAPE. A school district clearly is not required to “maximize each child’s potential commensurate with the opportunity provided other children,” Rowley, 458 U.S. at 198 (internal citation omitted), *i.e.*, to provide all children with equal educational opportunity. The Third Circuit, however, has held that an IEP must confer a “*meaningful*” educational benefit.” T.R. ex rel. N.R. v. Kingwood Township Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000) (citing Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182 (3d Cir. 1988), and Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999)). Further, that benefit “must be gauged in relation to a child’s potential.” Kingwood, 205 F.3d at 578 (quoting Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999)). Based on the analysis set forth below, we agree that the IDEA requires an IEP to confer a “meaningful educational benefit” gauged in relation to the potential of the child at issue. Deal v. Hamilton County Board of Education, 2004 WL 2901186 (6th Cir.(Tenn.))

The Court in Rowley rejected the idea that self-sufficiency was the substantive standard that Congress imposed on the states, “[b]ecause many mildly handicapped

children will achieve self-sufficiency without state assistance while personal independence for the severely handicapped may be an unreachable goal.” Rowley, 458 U.S. at 201 n. 23. Indeed, one of the stated purposes of the IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs *and prepare them for employment and independent living.*” 20 U.S.C. § 1400(d)(1)(A) (emphasis added).

Parents may receive retroactive reimbursement for private educational services they unilaterally provide to their child in certain circumstances. Sch. Comm. of Burlington v. Dep’t of Educ., 471 U.S. 359, 370, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985); Knable, 238 F.3d at 763. Parents are entitled to such reimbursement if a court concludes both that the public placement violated the IDEA and that the private placement was proper under the IDEA. Florence County Sch. Dist. Four v. Carter ex rel. Carter, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993); Knable, 238 F.3d at 763. A private placement is proper under the IDEA if the education provided in the private placement is reasonably calculated to enable the child to receive educational benefits. Knable, 238 F.3d at 770 (citing Florence County, 510 U.S. at 11). Parents are only entitled to retroactive reimbursement for private educational placement and services if the school district failed to provide the student with a FAPE, and if the private placement chosen by the parents was reasonably calculated to enable the child to receive educational benefits. Florence County Sch. Dist. Four v. Carter ex rel. Carter, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993); Knable ex rel. Knable v. Bexley City Sch. Dist., 238 F.3d 755, 763 (6th Cir. 2001).

There is no evidence presented in the record to suggest that Hardin County has denied J.B. a free and appropriate public education. To the contrary, the overwhelming proof in this case shows that Hardin County has gone above and beyond the legal requirement placed upon it by the IDEA to provide J.B. with an IEP which is reasonably calculated to provide him with an educational benefit. It is apparent from the testimony of the witnesses that Hardin County provided highly qualified and well-trained staff to implement the ABA discrete trial methodology for J.B., which was requested by the parents. However, the parents cannot seem to see or acknowledge the efforts to which the school district has gone to accommodate them, and to provide J.B. with the best available educational plan available, or the extent to which J.B. has progressed, even though the results must be measured in the smallest of increments. They simply refuse to admit that the school was in fact doing the things they said they were, despite proof of the same, because the parents did not see the results as quickly or to the degree that they expected at home. If for no other reason, this hearing process should have been a positive experience for the parents, to the extent that it has been an educational process to allow them to confirm and see actual proof of adequate and appropriate education of their son by Hardin County, despite their unfounded suspicions to the contrary.

As was suggested at the hearing, this Administrative Law Judge finds that the parents were "sold a bad bill of goods" by unqualified persons who saw an opportunity to take advantage of the parents' fears and frustrations by making inflated and unrealistic promises about their child's potential that could not be attained. It would seem irresponsible and reckless by the parents to unilaterally withdraw their child from the most stable and least restrictive educational environment, and subject a child with such

severe disability to persons without proper education, experience, qualifications and training in the methodology most appropriate for J.B., just based upon promises made at a restaurant and one book to be purchased from a national bookstore chain. In fact, the evidence presented at the hearing showed that J.B.'s private placement with Ms. Haynes and Ms. Pittard is the most restrictive educational environment for J.B., which is doing him a disservice, and causing him to regress in areas and skills already attained at Hardin County Schools. The ALJ finds that the parents' private placement of J.B. is not reasonably calculated to provide J.B. with any educational benefit, and is not proper under the IDEA. Therefore, the parents are not entitled to any reimbursement for private placement, as requested.


It is understandable that parents of a severely disabled child will from time to time become overwhelmed, frustrated, impatient, and fearful regarding their child's educational ability and the adequacy of the child's present educational placement. However, such anxiety will not justify unreasonable and rash decisions based upon unrealistic and unattainable expectations, which cause regression in the very child whom the parents are endeavoring to protect and promote. The Administrative Law Judge would urge the parents of J.B. to heed the advice of Dr. Nettles and others in this case, who have consistently stated that any progress of J.B. needs to be measured, expected, and appreciated in very small steps and increments, and further be cautioned that it will be a very painstaking process to even see small steps. It is further recommended that the parents allow J.B. to be placed back in the Hardin County Schools, to avoid any further regression, and to afford him the opportunity to receive the support, instruction, and

nurturing from highly qualified and caring teachers and staff that he previously received and benefited from.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT the Petitioner's due process request and all claims related thereto are hereby denied and dismissed with prejudice. The evidence preponderates in favor of the school district on all disputed issues. Therefore, Hardin County Schools is the prevailing party.

THIS DECISION IS BINDING UPON ALL PARTIES UNLESS APPEALED. Any party aggrieved by the findings and decision may appeal to the Davidson County Chancery Court of the State of Tennessee, or may seek review in the United States District Court for Tennessee. Such an appeal must be taken within sixty (60) days of the entry of the Final Order in non-reimbursement cases, and within three (3) years in cases involving reimbursement of educational costs and expenses. In appropriate cases, the reviewing Court may direct this Final Order be stayed.

ENTERED this 7th day of July, 2005.


D. MICHAEL DUNAVANT
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Final Order has been forwarded, via first class U.S. Mail, this 7th day of July, 2005, to the following:

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D. MICHAEL DUNAVANT